KULANDI MUTHU

v.

SUBRAMANIAM VELLIAPPAN

HIGH COURT MALAYA, SEREMBAN
MOHD. AZMI FJ
[CIVIL APPEAL NO. 4 OF 1982]
11 FEBRUARY 1983

EVIDENCE: *Loan - Whether repaid - Whether overpaid - Loan admitted - Confession and avoidance - Burden of proof - Failure to call witness - Inference to be drawn.*

The appeal was against the decision of the Magistrate in dismissing the claim of the appellant for the return of a friendly loan of RM6,000 given to the respondent. On the pleadings, the respondent had pleaded not only repayment but overpayment and counterclaimed for the sum overpaid. The counter-claim was dismissed and there was no appeal.

Held:

[1] The Magistrate had misread the pleadings and thereby misdirected himself in law on burden of proof. The defence being in the nature of confession and avoidance and the loan having being admitted, the burden of proof was on the respondent to prove the repayment and overpayment on a balance of probabilities.

[2] The Magistrate erred in law in making adverse inference against the appellant instead of the respondent, of the appellant failing to call his wife and son as witnesses, and for requiring further and better particulars from the appellant. It was for the respondent to put forward all relevant facts before the Court as the burden of proof was on him.

[3] On the issue of repayment, the Magistrate's finding was against the weight of evidence. An adverse inference ought to have been drawn against the respondent under s. 114(g) of the Evidence Act on his failure to call the appellant's wife, whom he had subpoened as a witness. The respondent's account of the settlement of the loan was clumsy. It was inconceivable how the Magistrate could describe the repayment as having been proved by concise evidence when on the same accounting evidence he was not satisfied of the excess repayment and had rightly dismissed the counter-claim.

[Appeal allowed]

Legislation referred to:
Evidence Act 1950, s. 114 illus(g)
Limitation Ordinance 1953, s. 6

Other sources referred to:
Odgers on Pleading and Practice, 20th Edn., pp. 143-147

For the appellant - A.K.J. D'Cruz; M/s. A.K.J. D'Cruz & Co.
For the respondent - John Fernandez; M/s. Fernandez & Co.

JUDGMENT

Mohd. Azmi FJ:

This is an appeal against the decision of the Magistrate at Port Dickson in dismissing the claim of the appellant for the return of a friendly loan of RM6,000 given to the respondent.

On the pleadings, the respondent averred that the claim was statute barred by virtue of s. 6 of Limitation Ordinance, 1953. Alternatively, he pleaded that he had not only repaid the sum of RM6,000 but had paid the appellant a further sum of RM3,459.60 in excess. He therefore counter-claimed for the sum overpaid. The defence of limitation was abandoned, and on the pleadings and the evidence the loan of RM6,000 was admitted although there was some confusion at the trial whether the money was given in 1970 or 1973. The only issue before the Magistrate was whether the loan had been repaid, and if it had been fully repaid whether there was an overpayment so as to entitle the respondent to his counter-claim of RM3,459.60.

The main ground of appeal is that the Magistrate erred in law in placing the burden of proof of repayment on the appellant/plaintiff instead of on the respondent/defendant. It seems clear that the Defence in this case was in the nature of confession and avoidance (see pp. 143 - 147 *Odgers on Pleading and Practice*, 20th Edn.) and as such the burden should be on the respondent to prove repayment of the RM6,000 loan. On the counter-claim the burden is also on the respondent to prove the overpayment. But in the Grounds of Decision, whilst recognising that the parties were bound by their pleadings and that the loan was not in dispute, the Magistrate had dismissed the appellant's claim on the principal grounds that the appellant had not supplied further and better particulars and for failing to call his wife and son to give evidence, and on the ground that "all relevant facts in this issue were not before the Court." Reading the grounds of decision, I am satisfied that the Magistrate had misread the pleadings and thereby misdirected himself in law on burden of proof. The loan having been admitted, it is for the respondent to prove the repayment and overpayment on balance of probabilities in the evidence. If the repayment and overpayment had been made wholly or partly through appellant's wife and son, it is for the respondent to call them as witnesses. The Magistrate therefore erred in law in making adverse inference against the appellant instead of against the respondent for not calling them as witnesses. The Magistrate also erred in law in requiring further and better particulars from the appellant when the loan was not in dispute. Further, where the burden of proof is on the respondent, it is for him to put forward all relevant facts before the Court. Failure to do so should not result in the dismissal of the appellant's claim.

On the issue of repayment, the Magistrate's finding was against the weight of evidence. He found there was some sort of agreement or understanding between the respondent and appellant's wife, and that the respondent had given a concise account of repayment for settlement of the loan. The appellant's wife was subpoened by the Defence and she was available in Court. By failing to call her as a witness, an adverse inference ought to have been drawn under s. 114(g) of the Evidence Act that if she had given evidence she would have given unfavourable evidence for the defence. As stated earlier, instead the Magistrate had given adverse inference against the appellant. In my judgment, if the Magistrate had applied the law to the facts of the case properly, he ought to have come to the conclusion that the repayment of RM6,000 loan had not been proved having regard to the pleadings and the probabilities in the evidence.

As regards respondent's counter-claim, there is no appeal against its dismissal. In my view it was rightly dismissed. On the issues of repayment and over-payment, according to respondent's evidence-in-chief, from January 1971 to August 1972, he paid a total sum of RM2,400 in cash to the appellant by instalments of RM120 per month although no receipts were obtained for these payments and no witnesses could be produced to substantiate them.

Another group of payments was made by way of cheques totalling RM3,879.60 for which 22 cheques were produced although five of them had not been cleared (Exhibit D5). From January 1977 to February 1978, repayment to the value of RM3,180 was made in kind by supplying 3 gallons of toddy to appellant's wife daily at a price of RM2.50 per gallon. Respondent was a toddy contractor and strangely enough no acknowledgment was obtained from the appellant's wife for such daily supply although witnesses were called to corroborate the alleged supply of toddy. Thus, according to the defence, total repayment by way of cash, cheques and toddy was RM9,459.60 giving rise to an excess of RM3,459.60 the subject matter of the counter-claim. It was on these clumsy evidence that the Magistrate found that the respondent had given a concise account of the settlement of the loan. In view of the nature and mode of the alleged repayments between 1971 and 1978, it is inconceivable how the Magistrate could describe the repayment of the RM6,000 loan as having been proved by concise evidence when on the same accounting evidence he was not satisfied of the excess repayment of RM3,459.60 claimed in the counter-claim. By dismissing the respondent's counter-claim the alleged repayment of the RM6,000 loan itself should, on balance, have been rejected since the total repayment of RM9,459.60 was allegedly paid from one continuous account by bits and pieces, over a period of 8 years not only in cash and cheques but also by the supply of toddy tapped from the appellant's trees.

For the above reasons, I allow this appeal with costs. The dismissal of the appellant's claim is set aside and I order that judgment be entered for the appellant in the sum of RM6,000, interests and costs.

Also found at [1983] 1 CLJ 302